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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. _____

CHESTER McKINNEY,
Petitioner,

v.

CITY OF BIRMINGHAM,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

Chester McKinney, Petitioner, prays that a Writ of Certiorari Issue to review the judgment of the Court of Criminal Appeals of Alabama, entered in this case on January 11, 1972.

OPINIONS BELOW

On May 13, 1972, Petitioner was found guilty by the trial court, without the intervention of a jury, of knowingly selling and exhibiting obscene matter in violation of ordinance 67-2, Section 3 of the City of Birmingham, Alabama. His conviction was in each of six cases, and in each he was sentenced to 180 days at hard labor for the City of Birmingham and fined $300.00. Petitioner appealed to the Court of Criminal Appeals of Alabama. Through the negligence of a messenger service Petitioner's brief was filed one day late. Consequently, on January 11, 1972, the Court of Criminal Appeals dismissed the consolidated appeals without opinion. Copies of the trial court's judgments are attached hereto as Appendix A. A copy of the order dismissing the appeals is attached hereto as Appendix B. A timely application for rehearing was filed and was stricken without opinion on January 26, 1972. A copy of the order striking the petition for rehearing is attached hereto as Appendix C. A timely petition for a Writ of Certiorari was filed in the Supreme Court of Alabama and was denied on February 24, 1972. A copy of the order denying the petition for a Writ of Certiorari is attached hereto as Appendix D. A timely application for rehearing was filed and was overruled on March 23, 1972. A copy of the order overruling the application for rehearing is attached hereto as Appendix E.

JURISDICTION

The application for rehearing was overruled by the Supreme Court of Alabama on March 23, 1972. This Petition is filed within ninety days of that date. The jurisdiction of this Court is invoked under *28 U.S.C. § 1257 (3).*

QUESTIONS PRESENTED

1. Whether the publications and films involved herein are not obscene in the constitutional sense and hence are protected expression under the *First* and *Fourteenth Amendments* to the *Constitution of the United States.*

2. Whether there can be a constitutionally valid judicial determination of obscenity as to the publications and films herein, consistent with Petitioner's rights to procedural and substantive Due Process required by the *Fifth* and *Fourteenth Amendments* to the *Constitution of the United States* in the absence of any affirmative evidence on each of the constitutionally relevant elements of the standards for judging proscribable obscenity not protected under the *First Amendment.*

3. Whether there can be a constitutionally valid conviction of Petitioner, consistent with the substantive and procedural Due Process requirements of the *First* and *Fourteenth Amendments* to the *Constitution of the United States,* utilizing a local or statewide standard for judging contemporary community standards rather than a national community standard.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the *First, Fifth* and *Fourteenth Amendments* to the *Constitution of the United States* and the provisions of *City of Birmingham Ordinance No. 67-2, Section 3,* are set forth in Appendix F.

STATEMENT OF THE CASE

Six cases were tried together on stipulated sets of facts and the appeals were also consolidated. The allegedly obscene materials were, in each case, respectively, as follows: Case No. 279, a magazine entitled "Mates"; Case No. 280, a magazine entitled "236 Soul Mates"; Case No. 281, a magazine entitled "240 Loving Couples"; Case No. 282, magazines entitled "Pendulum" and "Switch Hitters"; Case No. 283, an "untitled, silent, sixteen-millimeter motion picture film in color running approximately thirty minutes in time"; Case No. 284, a motion picture film entitled "The Ranch Hand".

The stipulations of facts are substantially identical, with the exception that they necessarily vary with regard to the person who purchased or viewed the different magazines or films; the dates; and the names of the different materials involved, be they magazines or motion picture films.

With the above reservations the stipulation of fact in what became Case No. 279 in the Court of Criminal Appeals of Alabama is identical with those in the other five cases and is set forth below verbatim:

> "1. That the Defendant, Chester E. McKinney, is the manager and operator of the Paris Bookstall located at 2125 Fifth Avenue North, in the City of Birmingham, County of Jefferson, Alabama, and was so operating said Bookstall on May 25, 1970.
>
> "2. That the exterior of the Paris Bookstall clearly and distinctly displays "Adult Only" signs, both on the inside and on the outside, its windows being painted so that a person from the outside is unable to see the materials being sold on the inside of said establishment.

"3. That on said date of May 25, 1970, the Defendant, Chester E. McKinney, did sell to Sgt. J. H. Rumsey of the Birmingham Police Department one picture magazine entitled "Mates"; that said magazine, and like magazines on display in the bookstore, are sealed in cellophane covers so that a person cannot pick said magazine up and thumb through it.

"4. That the Defendant, Chester E. McKinney, operated said bookstore intending the publication to be distributed and exhibited solely to adults and not to minors, to be distributed in such a manner as not to intrude upon the sensibilities and privacy of the general public, and not to be advertised in such a manner as to deliberately emphasize the alleged obscenity of the magazine.

"5. That subsequent to the abovestated purchase, the Birmingham Recorders Court Judge, after examining said purchased book, did on May 26, 1970, issue a warrant of arrest for the Defendant, Chester E. McKinney, for the sale of obscene materials, the magazine hereinabove described, contrary to and in violation of *Ordinance No. 67-2, Section 3,* of the City of Birmigham, Alabama, and that said warrant was executed and Chester E. McKinney was arrested on May 26, 1970.

"6. That the purchased book described hereinabove be and is attached hereto as the City's Exhibit A and it is stipulated that this book will be admitted into evidence as such.

"7. The City further stipulates that there were no juveniles involved in this incident, that there was no thrusting of the material upon any individual in an obtrisive manner so as to make it impossible for an

unwilling individual to avoid exposure to it and there was not pandering in the sense expressed by the United States Supreme Court in the case of *Ginzburg v. U.S.*, 383 U.S. 304 (1966).

"8. The City further stipulates that the Defendant denies that the publication hereinabove described and attached hereto as the City's Exhibit A is legally obscene, and further that Defendant denies he did knowingly sell, delivery, distribute and provide and offer and agree to sell, deliver, distribute and provide any legally obscene publication.

"9. The parties further stipulate that the City has not produced affirmative evidence (1) that the publication goes substantially beyond customary limits of candor, in the nation as a whole, in the description or representation of matters pertaining to sex, nudity, or excretion, (2) that to the average person, applying contemporary community standards, the dominant them of the publication, taken as a whole, appeals to the prurient interests, and (3) that the said publication is utterly without social importance. It is the City's contention that such affirmative evidence is not necessary while the Defendant contends such affirmative evidence is necessary before said publication can be found to be obscene.

"10. The City and Defendant hereby agree that the issues involved in this case are (1) that the legal obscenity of the above-described publication marked Exhibit A, (2) whether or not Defendant is guilty of selling and distributing said publication, obscene *vel non,* under controlled circumstances not involving *Ginzburg* pandering and not disseminated to minors nor foisted upon the public in such a manner that it would affront an individual wishing to avoid

confrontation with it, (3) whether affirmative evidence is a necessary prerequisite to prove said publication to be obscene, and (4) whether the Defendant did knowingly sell and distribute or offer to sell and distribute any legally obscene publication.

"11. The Defendant reserves an objection to the submission of the purchased publication into evidence subject to this Court's ruling on the basis that a warrant was issued ex parte by Judge Tennant M. Smallwood for the arrest of the Defendant without a prior judicially superintended adversary hearing to first determine whether or not the publication made the basis for his arrest was constitutionally obscene.

"12. The Plaintiff and Defendant further agree that for the purpose of this submission the City of Birmingham contends that the Exhibit A attached hereto is not protected by the *First Amendment* to the *United States Constitution,* for that same is legally obscene within the definition of obscenity as stated in *Ordinance No. 67-2* of the City of Birmingham.

The cases were submitted upon the stipulations and thereafter, on May 13, 1971, the trial court found Petitioner herein guilty as charged in the complaints and sentenced Petitioner to One Hundred Eighty (180) days hard labor for the City of Birmingham in each case and to pay a Three Hundred Dollar ($300.00) fine in each case. Sentence was suspended pending appeal.

HOW FEDERAL QUESTIONS WERE PRESENTED

In each case substantially identical Demurrers were filed and were subsequently overruled. Also, in each case

substantially identical Motions to Quash were filed and subsequently overruled. Both the Demurrers and the Motions to Quash contended that the respective materials involved were not obscene in the constitutional sense as a matter of law and hence were protected expression under the *first* and *Fourteenth Amendments* to the *Constitution of the United States,* particularly in view of the manner of their dissemination. Said contention is also preserved in the Stipulation of Facts at paragraph Ten. The issue as to whether affirmative proof of obscenity is necessary appears in both Paragraphs Nine and Ten of the Stipulation of Facts.

Assignment of Error preserving the issues set forth herein were made the basis of the Appeal to the Criminal Court of Alabama.

After the Petitioner's brief was filed in the Court of Criminal Appeals of Alabama the City of Birmingham filed a Motion to Dismiss the Appeal of Appellant or to Affirm the Judgment. The grounds for said motion were: (1) the brief was filed one day late; (2) the brief did not contain a certificate of service upon counsel for Appellee, signed by the Appellant or his attorney (a certificate was signed by a secretary for one of Appellant's counsel; there was no question as to service itself); (3) five pages of the brief were printed in type smaller than pica type; and (4) the brief exceeded fifty pages, not counting cover, index, and list of authorities other than authorities listed under "Propositions of Law". All of said grounds were said to be in violation of the *Revised Rules of the Supreme Court of Alabama, Title 7, Code of Alabama, 1940,* by which the Court of Criminal Appeals of Alabama is governed.

The appeals were dismissed on said motion on January 11, 1972. A rehearing was denied. A Petition for a Writ of Certioari to the Supreme Court of Alabama was denied to the application for rehearing addressed to that Court was overruled. This Petition follows within ninety days.

REASONS FOR GRANTING THE WRIT

I.

PETITIONER'S PROCEDURAL DEFAULTS IN PERFECTING HIS APPEAL SHOULD NOT, IN THIS CASE, PREVENT CONSIDERATION OF HIS FEDERAL CLAIMS BECAUSE COMPLIANCE WITH THE STATE'S PROCEDURAL RULES DO NOT, IN THIS INSTANCE, SERVE A LEGITIMATE STATE INTEREST.

It is anticipated that Respondent will insist, in its Brief in Opposition or Motion to Affirm that this Court has no certiorari jurisdiction in this matter because the dismissal of Petitioner's appeal by the Court of Criminal Appeals of Alabama rests on an adequate and independent state ground. Such is not the case.

This Court has long since held that the question of when and how defaults in compliance with state procedural rules can preclude its consideration of a federal question is itself a federal question. *Henry v. Mississippi,* 379 U.S. 433, 85 S. Ct. 564, 13 L. Ed. 2d 408 (1965); Cf. *Lovell v. Griffin,* 303 U.S. 444, 450, 58 S.Ct. 666, 82 L. Ed. 949, 952.

In *Henry v. Mississippi, supra,* this Court had before it the question of whether a Mississippi rule requiring

contemporaneous objection to the introduction of illegal evidence should prevent review by the Supreme Court of federal questions in that case when timely objection was not made to the admission of illegally seized evidence.

After citing the cases referred to above and *Liner v. Jafco, Inc.*, 375 U.S. 301, 84 S. Ct. 391, 11 L. Ed. 2d 247, Mr. Justice Brennan, writing for the majority, stated as follows:

> "These cases settle the proposition that a letigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the State's insistence on compliance with its procedural rule serves a legitimate state interest. In every case we must inquire whether the enforcement of a procedural forfeiture serves such a state interest. If it does not, the state procedural rule ought not be permitted to bar vindication of important federal rights." *Henry v. Mississippi*, 379 U.S. 443, 447, 448, 85 S. Ct. 564, 13 L. Ed. 2d 408, 413 (1965).

Petitioner submits that the enforcement of the rules requiring dismissal of the appeal because of the procedural defaults involved herein does not serve a legitimate state interest in this instance. The appeal to the Court of Criminal Appeals of Alabama was timely. The brief was only one day late and the City of Birmingham has not contended, even in its Motion to Dismiss, that it was prejudiced. See the Motion to Dismiss the Appeals of Appellant or to Affirm the Judgment attached hereto as Appendix G.

In *Henry v. Mississippi, supra,* the legitimate state interests of the State of Mississippi were identified as "avoiding delay and waste of time in the disposition of the

case." *Henry v. Mississippi, supra,* at 449. Clearly there could have been no delay occasioned by the late filing of Petitioner's brief or by the other matters complained of in the Respondent's Motion below. Especially is this true in view of the fact that oral argument was requested by Petitioner below and this requires that a date be set for argument by the Court at some date subsequent to its receipt of the Brief. Nor is this a case, as was *Monger v. Florida,* 405 U.S. 958 (1972), in which an adequate state ground might be found because of the importance of preventing interlocutory appeals or piecemeal litigation. However, as was pointed out by Mr. Justice Douglas in that case, in a dissent concurred in by Mr. Justice Brennan and Mr. Justice Stewart, no state interest which would have been served was pointed out by the State of Florida. Similarly, no state interest was put forth by the Respondent in his Motion below.

It was said in *Davis v. Wechsler,* 263 U.S. 22, 24-25:

> Whatever springes the State may set for those who are endeavoring to assert rights that the state confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice . . . [I]t is necessary to see that local practice shall not be allowed to put unreasonable obstacles in the way."

This Court has, on more than one occasion refused to allow Alabama procedural rules to prevent vindication of federal rights. Cf. *NAACP v. Alabama,* 357 U.S. 449, 78 S. Ct. 1163, 2 L. Ed.2d 1488 and *NAACP v. Alabama,* 377 U.S. 288, 84 S. Ct. 1302, 12 L. Ed.2d 324. In the latter case, this Court stated:

> "The consideration of asserted constitutional rights may not be thwarted by simple recitation that there has not been observance of a procedural rule with which there has been compliance in both substance and form, in every real sense. *Davis v. Wechsler,* 263 U.S. 22, 24, 68 L.Ed. 143, 145, 44 S. Ct. 13; *Staub v. City of Baxley,* 355 U.S. 313, 318-320, 2 L. Ed. 2d 302, 308-310, 78 S. Ct. 277. To the same effect see this Court's discussion of a similar aspect of prior proceedings in this case, 357 U.S. at 454-458, 2 L.Ed.2d at 1495-1497." *NAACP v. Alabama,* 377 U.S. 288, 297, 84 S. Ct. 1302, 12 L.Ed. 2d 324.

Petitioner respectfully submits that it would be unjust in the extreme for his state court conviction to stand because of a procedural default when he has had no appellate review on the merits whatsoever and among the issues he raises are at least one which this Court has felt important enough to hear oral argument on. Cf. *Miller v. California,* No. 70-73, argument heard January 19, 1972.

II.

THE ALLEGEDLY OBSCENE MATERIALS UPON WHICH PETITIONER'S CONVICTIONS ARE BASED ARE NOT OBSCENE IN THE CONSTITUTIONAL SENSE AS A MATTER OF LAW, GIVEN THEIR MANNER OF DISSEMINATION, AND ARE PROTECTED EXPRESSION UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

This Court, in *Roth v. United States,* 354 U.S. 476 (1957) and *Memoirs v. Massachusetts,* 383 U.S. 413 (1966),

defined the legal test for determining obscenity. The tri-partite test that must be satisfied is: (1) the material, taken as a whole, must appeal to the prurient interest of an average person; (2) the material must be patently offensive by contemporary community standards because it goes substantially beyond the customary limits of candor in depicting sex and nudity; and (3) the materials must be utterly without redeeming social value.

At page 488 of the *Roth* decision, Mr. Justice Brennan said:

> "The fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring Federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests."

It seems that the more important interest referred to by Justice Brennan is the right of our society to enjoy privacy and only when speech or expression invade that right can Free Speech be weighed against that factor. *Breard v. City of Alexandria,* 341 U.S. 622.

In *Redrup v. New York,* 386 U.S. 767 (1967), this Court reversed three (3) lower court convictions because, no matter which test of obscenity was applied, the materials were not obscene. The Court found it important that:

> "IN NONE of the cases was there a claim that the statute in question reflected a specific and limited

state concern for juveniles. See, *Prince v. Massachusetts*, 321 U.S. 158; cf. *Butler v. Michigan*, 352 U.S. 380. In none was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it. Cf. *Breard v. Alexandria*, 341 U.S. 622; *Public Utilities Comm'n v. Pollak*, 343 U.S. 622. And in none was there evidence of the sort of 'pandering' which the Court found significant in *Ginsburg v. United States*, 383 U.S. 462."

This Court has reversed the following cases without written opinion, based upon *Redrup, supra: Austin v. Kentucky*, 386 U.S. 767 (1967); *Gent v. Arkansas*, 386 U.S. 767 (1967); *Ratner v. California*, 388 U.S. 442 (1967); *Cobert v. New York*, 388 U.S. 443 (1967); *Keney v. New York*, 388 U.S. 440 (1967); *Freidman v. New York*, 388 U.S. 441 (1967); *Aday v. United States*, 388 U.S. 457 (1967); *Avansino v. New York*, 388 U.S. 446 (1967); *Sheperd v. New York*, 388 U.S. 444 (1967); *Corinth Publications, Inc. v. Wesberry*, 388 U.S. 448 (1967); *Books, Inc. v. United States*, 388 U.S. 449 (1967); *Mazes v. Ohio*, 388 U.S. 453 (1967); *Schackman v. California*, 388 U.S. 454 (1967); *Quantity of Books v. Kansas*, 378 U.S. 205 (1964); *Central Magazine Sales, Ltd. v. United States*, 389 U.S. 50 (1967); *Potomac News Co. v. United States*, 389 U.S. 47 (1967); *Conner v. City of Hammond*, 389 U.S. 48 (1967); *Chance v. California*, 389 U.S. 89 (1967); *I.M. Amusement Corporation v. Ohio*, 389 U.S. 573 (1968); *Robert-Arthur Management Corp. v. State of Tennessee*, 388 U.S. 578 (1968); *Felton v. City of Pensacola*, 390 U.S. 340 (1968); *Henry v. State of Louisiana*, 392 U.S. 655 (1968); *Carlos v. New York*, 396 U.S. 119 (1969); *Cain v. Kentucky*, 397 U.S. 319 (1970); *Bloss v.*

Dykema, 398 U.S. 278 (1970); *Walker v. Ohio*, 398 U.S. 434 (1970); *Hoyt, et al. v. State of Minnesota*, 399 U.S. 524 (1970); *Childs v. Oregon*, 401 U.S. 1006 (1971); *Bloss v. Michigan*, 402 U.S. 938 (1971); *Burgin v. South Carolina*, 404 U.S. 806 (1971); *Wiener v. California*, 404 U.S. 988 (1971); *Hartstein v. Missouri*, 404 U.S. 988 (1971).

These cases have arisen under federal and state prosecutions, as well as civil proceedings; the materials involved have been books, magazines, photographs, films, all dealing with sexually-oriented subject matter with verbal and/or graphic depiction of the human anatomy, some involving sexual activity. Although Petitioner will not attempt to fully describe all the materials involved, the following excerpts from the lower court decisions are relevant to the instant case:

Cain v. Kentucky, supra. This decision involved the motion picture, "I, A Woman."

A Description of the film is set forth by the Court of Appeals for Kentucky in the case styled *Cain v. Commonwealth of Kentucky*, 437 S.W.2d 769 (1969);

> "We have have viewed the evidence presented to the trial jury. The film is a 90-minute motion picture devoted almost entirely to the sexual encounters of one female by the name of Eve. It opens opens by showing Eve nude in her bedchamber engaged in the practice of caressing herself in a suggestive manner to the accompaniment of her father's violin. She progresses to a passionate love scene with her fiance, Svend, while lying fully clothes on top of him in her bedchamber. This act is performed with the camera

> full on the subject. From this the film proceeds to the act of intercourse with a married patient, Heinz Goertzen, in a hospital room where Eve is employed as a nurse. This act she solicits with the use of nude photographs taken of her by her fiance for this specific purpose. During the course of the sequence, the camera focuses upon the head of the male partner. It shows the male partner caressing with kisses the area between the navel and the pubic hair. The camera then shifts during the act of intercourse to the face of the female subject. After this, the film follows the life of Eve from one act of sexual intercourse to another until it has been accomplished some five times, all with different partners. Each time the act is as vividly portrayed upon the screen as was the scene in the hospital room. In one instance the sex act is in the form of rape."

Bloss v. Dykema, supra, involved fifteen (15) "girlie magazines." The Court of Appeals of Michigan found, at 169 N.W.2d 367 91969), that:

> "Generally speaking, most of the magazines, especially editions of 'Cover Girl' and 'Exciting', are dominated by photographs of nude or near-nude women in various sexual poses. These photographs often depict: the model on a bed or a bed is part of the picture; the model is in an enticing or lewd position such as a position of sexual intercourse; the pubic area is bare and such clothing as the women wear tends to accentuate the focus on the pubic area, i.e., silk stockings and garter belt; the model's pose accentuates the pubic area, i.e., the vagina is open; the model removes her clothing in a series of pictures suggestively; properties such as beds, stools, veils, chairs and clothing are used in such a way as to heighten prurient interest . . . "

Burgin v. South Carolina, 404 U.S. 806 (1971), involved four (4) magazines entitled "Mirage", "Togetherness", "Fair Lady", and "Flesh and Fantasy", Vol. 2, No. 1. The Supreme Court of South Carolina, at 178 S.E.2d 325, wrote:

> "This Court has viewed the magazines and finds that the lower court accurately described them as follows:
>
> > 'I find the book "Mirage" is a book containing color photographs of completely nude and/or semi-nude females. The semi-nudes only being that of females wearing garter belts, hose or other transparent materials. That the nudes are posed in such positions with legs wide spread that the pubic hair and external part of the genital organs are clearly visible. They are posed in positions sitting, lying forward and backwards, leaning backwards, standing on their heads, all positions so that the camera would be focused directly upon the genital organs and breasts of the nudes.
> >
> > 'In the magazine "Togetherness", I find there are colored photographs of male and female nudes, or semi-nudes having only garter belts, hose, and in some instances the males having on trousers cut out or removed therefrom. Also, in poses directed so that the camera could focus on the genital organs of the males and females in positions with the males and females emphasizing the pubic and rectal regions of the males and females.
> >
> > 'The magazine "Fair Lady" also portrays imilar color photographs of nude females in similar positions.

> 'In the magazine "Flesh and Fantasy" are black and white and color photographs of females with legs outstretched, completely nude, with females with clothes on undressing each piece of clothing in successive pictures, with the camera focused or ultimately focused completely upon the genital organs of the females'."

Hartstein v. Missouri, supra. On Tuesday, December 14, 1971, the Court reversed an obscenity conviction obtained in the State of Missouri. The reversal was based on *Redrup.*

The Supreme Court of Missouri described the material involved, a motion picture entitled "Night of Lust", as follows:

> "... [I]n most if not all instances without any relation to the plot, if any can be said to exist, are scenes of nude women including closeup portrayals of naked breasts ... 'Night of Lust' is approximately 65 minutes in length, and approximately 40 of those minutes consist of scenes of nude girls in various poses, actions and sequences, which bear no relation to a plot, and apparently are presented for the sole purpose of depicting nude girls in activity suggestive of sexual intercourse or of homosexual activity.
>
> ...
>
> "Under no possible standard could the motion picture 'Night of Lust' be related to art, literature or scientific works. It is the portrayal of nude women, which when considered alone may not be considered obscene according to language in *Manual Enterprises, Inc. v. Day, supra,* or obscene for adults, *Ginzberg v.*

New York, supra. However, that is not the limits of the portrayal in 'Night of Lust', by reason of the closeups scenes, and by use of nude body gyrations and undulations, the motion picture suggests promiscuous sexual intercourse and homosexual activity which is totally unrelated to any plot. Such scenes are patently offensive and are incorporated into the picture only to appeal to the prurient interest of the viewer. Such portrayals are not 'fragmentary and fleeting', *Jacobellis v. Ohio, supra,* but because of the quantity of such portrayals, the result is that the dominant theme of the picture, when considered as a whole, is the suggestion of promiscuous sexual intercourse and homosexuality."

Wiener v. California, supra. This Court reversed the judgment of the Appellate Department, Superior Court of California, County of San Diego, based on *Redrup, supra.* The following magazines and films were the subject matter of the California judgment:

A magazine entitled "My-O-My"
A magazine entitled "Wild'n Sassy"
A magazine entitled "Hello"
A magazine entitled "The Ballers", No. 1
A magazine entitled "Psychedelic"
A 200-foot color film
A 1200-foot color film
A 16 millimeter 400-foot color film
An 8 millimeter 400-foot color film.

The photographs in the *Wiener* magazines depict males, females, males with females, and males with males. all completely nude with some suggested sexual activity.

This Court has made it abundantly clear that the states are not free to adopt whatever procedures they please for dealing with obscenity without regard to the possible consequences for constitutionally protected speech. *Freedman v. Maryland,* 380 U.S. 51 at 57, 58 (1965). To prevent the suppression of speech which is constitutionally protected this Court must not abdicate its responsibility to make its independent determination as to whether the materials are obscene. *Jacobellis v. Ohio,* 378 U.S. 184 (1964). An examination of the materials involved in this case will reveal that they are constitutionally protected and therefore Petitioner's convictions must be reversed.

III.

THERE CANNOT BE A CONSTITUTIONALLY VALID JUDICIAL DETERMINATION OF OBSCENITY AS TO THE MAGAZINES AND FILMS HEREIN, CONSISTENT WITH PETITIONER'S RIGHTS TO PROCEDURAL AND SUBSTANTIVE DUE PROCESS REQUIRED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, IN THE ABSENCE OF ANY AFFIRMATIVE EVIDENCE ON EACH OF THE CONSTITUTIONALLY RELEVANT ELEMENTS OF THE STANDARDS FOR JUDGING PROSCRIBABLE OBSCENITY NOT PROTECTED UNDER THE FIRST AMENDMENT.

The City of Birmingham had the burden of proving the criteria enunciated in *Roth v. United States,* 354 U.S. 476 (1957) and *Memoirs v. Massachusetts,* 383 U.S. 413 (1966)

that: (1) the material, taken as a whole, appeals primarily to the prurient interest of the average adult; (2) the material is patently offensive by contemporary community standards because it goes substantially beyond the customary limits of candor in its description of sex and nudity; and (3) the material is utterly without redeeming social value or importance.

All three (3) of these tests must be independently determined and applied and, after which, each must coalesce before the material can be deemed obscene. *Memoirs v. Massachusetts,* 383 U.S. 413 (1966).

It is not incumbent upon a citizen, in securing these freedoms guaranteed to him by virtue of the *First, Fifth,* and *Fourteenth Amendments* to the *Constitution of the United States,* to affirmatively prove material protected expression. Under the teachings of this Court in *Speiser v. Randall,* 357 U.S. 513:

> "Where the transcedent value of speech is involved, due process certainly requires in the circumstances of this case that the State bear the burden of persuasion to show that the appellants engaged in criminal speech. Cf. *Kingsley Books, Inc. v. Brown,* 354 U.S. 436, 1 L. Ed. 2d 1469, 77 S. Ct. 1325."

The Court pointed out the chilling effect on free speech which would result if the citizenry had to bear the burden of proof, the public being the victim of the chilling effect:

> "The vice of the present procedure is that, where particular speech falls too close to the line separating the lawful and the unlawful, the possibility of

> mistaken fact-finding inherent in all litigation will create the danger that the legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade another the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens. This is especially to be feared when the complexity of the proofs and the generality of the standards applied, cf. *Dennis v. United States,* 341 U.S. 494, 95 L.Ed. 1137, 71 S. Ct. 857, *supra,* provides but shifting sands on which the litigant must maintain his position."

Mr. Justice Frankfurter's concurring opinion in *Smith v. California,* 361 U.S. 147, manifests the rationale for the requirement of affirmative proof as relates to Due Process:

> " . . . [F]or community standards or the psychological or physiological consequences of questioned literature can as a matter of fact hardly be established except through experts.
>
> . . .
>
> "There is no external measuring rod for obscenity. Neither, on the other hand, is its ascertainment a merely subjective reflection of the taste or moral outlook of individual jurors or individual judges. Since the law through its functionaries is 'applying contemporary community standards' in determining what constitutes obscenity, *Roth v. United States,* 354 U.S. 476, 489, 1 L. Ed.2d 1498, 1509, 77 S. Ct. 1304, it surely must be deemed rational, and therefore relevant to the issue of obscenity, to allow light to be shed on what those 'contemporary community standards' are. Their interpretation ought not to depend solely on the necessarily limited, hit-or-miss, subjective view of what they are believed

> to be by the individual juror or judge. It bears repetition that the determination of obscenity is for juror or judge not on the basis of his personal upbringing or restricted reflection or particular experience of life, but on the basis of 'Contemporary community standards'. Can it be doubted that there is a great difference in what is to be deemed obscene in 1959 compared with what was deemed obscene in 1859?"

On January 11, 1972 the Fifth Circuit Court of Appeals, in *United States v. Groner,* No. 71-1091, rehearing pending,said:

> "Knowing the legal test for obscenity and applying the same in light of recent Supreme Court decisions, however, are two entirely different matters. We are completely incapable of applying the test in the instant case. Without some guidance, from experts or otherwise, we find ourselves unable to apply the *Roth* standard with anything more definite or objective than our own personal standards of prudence and decency, standards which should not and cannot serve as a basis for either denying or granting first amendment protection to this or any other literature.
>
> "Jurors in an obscenity case are called upon to determine contemporary community standards and must then compare the materials in question to determine whether they go 'substantially beyond the limits of candor' is describing sex or nudity. Each juror is an individual separate in his morals, experience and taste. The only standards which govern his conduct and his judgment are his own, not those of the community as a whole, whether state-wide or national. Although such unfettered discretion is acceptable in determining questions of negligence, probable cause and intent, it has no place

in determining whether material is to be armed with first amendment protection. We can come to no other conclusion under the circumstances.

"This Court finds itself in the same position as that of the jury in such a case. We cannot take judicial notice, without even a scintilla of evidence, of what constitutes the community standard of dececny at this or any other time. If such a standard exists at all, we would expect that it would be in a constant evolutionary and even revolutionary flux, the fact of which militates against our exercising uninformed judgment at any particular point in time. At best it would be a matter of pure chance as to whether we, as a Court, or as individuals left to our own devices and without the aid of evidence, could determine the correct standard.

"Moreover, we think evidence of the materials' prueint appeal was necessary. The material in the instant case does not appeal to the prurient interests of this Court. Indeed, we have trouble imagining its appealing to the prurient interests of any normal, sane, healthy individual. It is just too disgusting and revolting to be so classified. To allow a case to go to a jury of laymen under such circumstances is to invite the jurors' equating patent offensiveness with prurient appeal and aiding suppression simply on the basis of speculation and suspiciion about the prurient appeal of material to some known. The possibility, even the probability, that jurors would be uncommonly sanctimonious or Puritanical in such a state of affairs should be obvious to anyone who has noted the numerous defeats of jury censors at the hands of the appellate courts.

"We wish to make it perfectly clear what we hold and what we failed to hold today in the instant case.

> We have expressed no opinion on the issue of whether the material involved here is or is not obscene. *In fact, our inability to do so is the basis for our holding that expert testimony is required on the elements of obscenity in order to furnish juries and this Court with an objective basis for deciding on the issue of first amendment rights."* (Slip Opinion.) (Emphasis added.)

See also, *United States v. Reidel,* 402 U.S. 351 (1971); *United States v. Thirty-Seven Photographs,* 402 U.S. 363 (1971); *United States v. Klaw,* 350 F.2d 155 (1965); *United States v. Thirty-Seven Photographs,* Civil No. 69-2242-F, U.S.D.C. Calif. (1971); *In Re Giannini,* 72 Cal Rptr. 655 (1968); *House v. Commonwealth of Virginia,* 169 S.E.2d (1969); *People v. Rosakos,* 72 Cal Rptr. 34, 36 (1968); *Commonwealth v. Dell Publications, Inc.,* 233 A.2d 840 (1967); *Dunn v. Maryland State Board of Censors,* 213 A.2d 751 (1965); *In Rem Seven Magazines,* 768 A.2d 707 (1970); *Ramirez v. State,* 430 P.2d 826 (1967); *City of Phoenix v. Fine,* 420 P.2d 26 (1966); and *Woodruff v. State,* 237 A.2d 436 (1970).

The City of Birmingham offered no affirmative proof of the elements of the crime charged, thus the Circuit Court of the Tenth Judicial Circuit found Petitioner guilty based on the Court's personal predisposition about actual explicitness and controversial subjects in violation of Appellant's constitutional rights under the *First, Fifth,* and *Fourteenth Amendments.*

The issue herein is of considerable constitutional dimension. This Court has never stated its views on the quality and quantum of proof which must be placed before

the trial court and jury in order to determine whether the relevant elements of obscenity are present in a challenged work. The issue far transcends that of the obscenity, or lack thereof, of the particular materials involved herein. The issue goes to the very integrity of the fact finding process at the trial court level itself. Due Process requires that the elements of a crime be proven beyond a reasonable doubt. To deprive a person of his liberty because of the subjective reactions of the trier of fact, be it judge or jury, without the guidance of evidence as to prurient appeal, contemporary community standards and the presence or absence of social value, is to sanction judicial conjecture and speculation. If the tests enunciated by this Court for determining obscenity are not susceptibel to proof outside the materials themselves, then the tests are unworkable and should be abandoned. If they are susceptible of proof then conviction without the proof of each element of obscenity violates Due Process.

This Court should address itself to this issue and furnish guidance to both law enforcement officials and defendants in this area of the law.

IV.

THE CONSTITUTIONALLY PROPER TEST FOR COMMUNITY STANDARDS IS THE NATIONAL COMMUNITY AND NOT A LOCAL COMMUNITY, I.E., STATE, COUNTY, OR MUNICIPALITY.

This Court, in *Jacobellis v. Ohio*, 378 U.S. 184, had before it the question of whether a movie entitled "The Lovers" was obscene. The decision of six members of the Court was that it was not obscene, and hence was protected

expression under the *First* and *Fourteenth Amendments* to the *Constitution of the United States.* It was suggested to the Court that the "contemporary community standards" aspect of the obscenity test implies a determination by the standards of the particular local community from which the cases arise.

Mr. Justice Brennan, in an opinion concurred in by Mr. Justice White, expressly rejected that notion:

> "This is an incorrect reading of *Roth.* The concept of 'contemporary community standards' was first expressed by Judge Hand in *United States v. Kennerley,* 209 F. 119, 121 (D.C.S.D.N.Y. 1913), where he said:
>
> > 'Yet if the time is not yet when men think innocent all that which is honestly germane to a pure subject, however little it may mince its words, still I scarcely think that they would forbid all which might corrupt the most corruptible, or that society is prepared to accept for its own limitations those which may perhaps be necessary to the weakest of its members. If there be no abstract definition, such as I have suggested, should not the word "obscene" be allowed to indicate the present critical point in the compromise between candor and shame at which the community may have arrived here and now? ***To put thought in leash to the average conscience of the time is perhaps tolerable, but to fetter it by the necessities of the lowest and least capable seems a fatal policy.
>
> 'Nor is it an objection, I think, that such an interpretation gives to the words of the

> statute a varying meaning from time to time. Such words as these do not embalm the precise morals of an age or place; while they presuppose that some things will always be shocking to the public taste, the vague subject-matter is left to the gradual development of general notions about what is decent. *** '

"It seems clear that in this passage Judge Hand was Referring not to the state and local 'communities', but rather to 'the community' in the sense of 'society at large; *** the public, or people in general'. Thus, he recognized that under his standard, the concept of obscenity would have 'a varying meaning from time to time' – not from county to county, or town to town.

"We do not see how any 'local' definition of the 'community' could properly be employed in delineating the area of expression that is protected by the Federal Constitution. Mr. Justice Harlan pointed out in *Manual Enterprises, Inc. v. Day*, 370 U.S. at 488 that a standard based on a particular local community would have 'the intolerable consequence of denying some section of the county access to material, there deemed acceptable, which in others might be considered offensive to prevailing community standards of decency. Cf. *Butler v. Michigan*, 352 U.S. 390." 378 U.S. 184 at 192-193.

Thereafter, Justice Brennan said the following: "*We thus reaffirm the position taken in Roth to the effect that the constitutional status of an allegedly obscene work must be determined on the basis of a national standard.*" 378 U.S. 184 at 195. (Emphasis added.)

Therefore, when one is charged with criminal violations of obscenity laws, the allegations must be proven with more than just the local community in mind. To do otherwise would be to permit the boundaries of the protection of the *First Amendment* to vary with invisible and arbitrary state and county boundaries.

Various States have utilized the national standards. A brief listing of such decisions includes: *State v. Locks,* 397 P.2d 949 (Arizona); *State v. Vollmar,* 389 S.W.2d 20 (Missouri); *Robert-Arthur Management Corp. v. Tennessee,* 414 S.W.2d 638 (Tennessee); *State v. Hudson County News,* 196 A.2d 225 (New Jersey). See also, Lockhart and McClure, *45 Minn. L. Rev.* 5, 111-112; *Pennekamp v. Florida,* 328 U.S. 331 at 335; *Manual Enterprises, Inc. v. Day,* 370 U.S. 478; *Butler v. Michigan,* 352 U.S. 380 at 383-384; and *United States v. Groner,* F.2d (CA-5 1972), rehearing pending.

This Court heard argument on January 19, 1972, in the case of *Miller v. California,* No. 70-73. That case presents the question "Is the use of a 'state-wide' standard to establish the alleged obscenity of printed materials distributed by the Defendant a violation of the *First* and *Fourteenth Amendments?*" Thus, it appears that the decision on that issue in *Miller* would be controlling in this case and for the reason alone certiorari should be granted.

CONCLUSION

Petitioner has been sentenced to an aggregate of three years at hard labor and fines totalling Eighteen Hundred Dollars ($1800.00) on the basis of a finding of obscenity by a

trial court judge unguided by one iota of evidence other than the allegedly obscene materials themselves. Whether this determination of his *First* and *Fourteenth Amendment* rights in regard to the materials is correct has not been reviewed by the appellate courts of Alabama because of a default, of which Petitioner himself was not even aware, in compliance with state procedural rules, the enforcement of which, in this case, cannot be said to serve a legitimate state interest. In the absence of the factors deemed important in *Redrup v. New York, supra,* the materials cannot be obscene in the constitutional sense and the record is devoid of any inkling as to what community standard the judge was taking judicial notice of in making his determination, if any.

Petitioner respectfully submits that the petition for a Writ of Certiorari should be granted and his convictions reversed.

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APPENDIX A

City of Birmingham
v.
Chester McKinney

Appealed from Recorder's Court
Violating City Ordinance 67-2
Honorable Elias C. Watson, Jr.,
Judge Presiding

JUDGMENT ENTRY NO. 31703
(Appeal 279)

This the 25th day of March, 1971, came Herbert Jenkins, Jr., who prosecutes for the City of Birmingham, and also came defendant in his own proper person and by attorney, Ferris S. Ritchey, and the City files its complaint. The defendant files demurrer and motion to quash. An agreed stipulation of facts if filed and case is continued to April 22, 1971.

This the 13th day of May, 1971, the Court has examined the evidence and the magazine as a whole and finds same to be obscene within the words of the ordinance for that the entire magazine is nothing but a collection of photographs depicting graphically nude men and women with their genitals fully exposed in poses and activities indicating actual sexual intercourse is either intended or has ended between the individuals shown, and its dominant theme appeals to the prurient interest of the average person within the meaning of the U.S. Supreme Court test when taken as a whole, applying contemporary community standards, and is patently offensive to community standards in that the magazine goes beyond the customary limits of candor and explicitness in its representation of sexual matters, and is utterly without any redeeming social value or importance, notwithstanding the fact that no juveniles were involved, there was no thrusting of the material upon unwilling individuals, and there was no pandering in the sale of said magazine. Therefore, the Court upon deliberating the facts and applying the law finds the defendant guilty as charged in the complaint and fixes his punishment at a fine of $300.00 and costs. It is therefore

considered by the Court and it is the judgment of the Court that said defendant is guilty as charged in said complaint and that he pay a fine of Three Hundred Dollars ($300.00) and costs of this cause.

The defendant being now in open Court and having presently failed to pay the fine of $300.00 and costs of $10.00 accrued in Recorder's Court of the City of Birmingham or to confess judgment with good and sufficient security for the same, it is therefore considered by the Court, and it is ordered and adjudged by the Court, and it is the sentence of the Law that the defendant, Chester McKinney, perform hard labor for the City of Birmingham for 155 days because of his failure to pay said fine and costs of $10.00 accrued in Recorder's Court, or to confess judgment with good and sufficient security therefor.

It is further considered by the Court, and it is ordered and adjudged by the Court, and it is the sentence of the Law that the defendant, Chester McKinney, perform additional hard labor for the City of Birmingham for 180 days, as additional punishment in this cause.

The costs legally taxable against the defendant in this cause amounting to $33.00 not being presently paid or secured and $10.00 of said amount being State Trial Tax $3.00, Law Library Tax $1.00, Fair Trial Tax $1.00, Peace Officers Retirement $5.00, leaving $23.00 taxable for sentence, it is ordered by the Court that defendant perform additional hard labor for the County for seven days, at the rate of $3.00 per day to pay said costs. It is further ordered by the Court that after the sentence for the City of Birmingham has expired, that the City authorities return the defendant to the County authorities to execute said sentence for costs.

It is further considered by the Court that the State of Alabama have and recover of the said defendant the costs in

this behalf expended, including the costs of feeding the defendant while in jail.

This 13th day of May, 1971, Notice of Appeal being given and it appearing to the Court that, upon the trial of this cause, certain questions of Law were reserved by the defendant for the consideration of the Court of Criminal Appeals of Alabama, it is ordered by the Court that the execution of the sentence in this cause be and the same is hereby suspended until the decision of this cause by said Court of Criminal Appeals of Alabama.

It is further ordered by the Court that the Appeal Bond in this cause be and the same is hereby fixed at $300.00, conditioned as required by Law.

MINUTE ENTRY

This the 4th day of October, 1971, this order was inadvertently omitted from the trial sheet for April 22, 1971, and is entered nunc pro tunc "The demurrer being considered by the Court, it is ordered that said demurrer be and the same is hereby overruled. The motion to quash being considered by the Court, it is ordered that said motion be and the same is hereby overruled."

JUDGMENT ENTRY NO. 31704
(Appeal 280)

This the 25th day of March, 1971, came Herbert Jenkins, Jr., who prosecutes for the City of Birmingham, and also came defendant in his own proper person and by attorney, Ferris S. Ritchey, and the City files its complaint. The defendant files demurrer and motion to quash. An agreed stipulation of facts if filed and case is continued to April 22, 1971.

This the 13th day of May, 1971, the Court has examined the evidence and the magazine as a whole and finds same to be obscene within the words of the ordinance for that the entire magazine is nothing but a collection of photographs depicting graphically nude men and women with their genitals fully exposed in poses and activities indicating actual sexual intercourse is either intended or has ended between the individuals shown, and its dominant theme appeals to the prurient interest of the average person within the meaning of the U.S. Supreme Court test when taken as a whole, applying contemporary community standards, and is patently offensive to community standards in that the magazine goes beyond the customary limits of candor and explicitness in its representation of sexual matters, and is utterly without any redeeming social value or importance, notwithstanding the fact that no juveniles were involved, there was no thrusting of the material upon unwilling individuals, and there was no pandering in the sale of said magazine. Therefore, the Court upon deliberating the facts and applying the law finds the defendant guilty as charged in the complaint and fixes his punishment at a fine of $300.00 and costs. It is therefore considered by the Court and it is the judgment of the Court that said defendant is guilty as charged in said complaint and that he pay a fine of Three Hundred Dollars ($300.00) and costs of this cause.

The defendant being now in open Court and having presently failed to pay the fine of $300.00 and costs of $10.00 accrued in Recorder's Court of the City of Birmingham or to confess judgment with good and sufficient security for the same, it is therefore considered by the Court, and it is ordered and adjudged by the Court, and it is the sentence of the Law that the defendant, Chester McKinney, perform hard labor for the City of Birmingham for 155 days because of his failure to pay said fine and costs of $10.00 accrued in Recorder's Court, or to confess judgment with good and sufficient security therefor.

It is further considered by the Court, and it is ordered and adjudged by the Court, and it is the sentence of the Law that the defendant, Chester McKinney, perform additional hard labor for the City of Birmingham for 180 days, as additional punishment in this cause.

The costs legally taxable against the defendant in this cause amounting to $33.00 not being presently paid or secured and $10.00 of said amount being State Trial Tax $3.00, Law Library Tax $1.00, Fair Trial Tax $1.00, Peace Officers Retirement $5.00, leaving $23.00 taxable for sentence, it is ordered by the Court that defendant perform additional hard labor for the County for seven days, at the rate of $3.00 per day to pay said costs. It is further ordered by the Court that after the sentence for the City of Birmingham has expired, that the City authorities return the defendant to the County authorities to execute said sentence for costs.

It is further considered by the Court that the State of Alabama have and recover of the said defendant the costs in this behalf expended, including the costs of feeding the defendant while in jail.

This 13th day of May, 1971, Notice of Appeal being given and it appearing to the Court that, upon the trial of this

cause, certain questions of Law were reserved by the defendant for the consideration of the Court of Criminal Appeals of Alabama, it is ordered by the Court that the execution of the sentence in this cause be and the same is hereby suspended until the decision of this cause by said Court of Criminal Appeals of Alabama.

It is further ordered by the Court that the Appeal Bond in this cause be and the same is hereby fixed at $300.00, conditioned as required by Law.

MINUTE ENTRY

This the 4th day of October, 1971, this order was inadvertently omitted from the trial sheet for April 22, 1971, and is entered nunc pro tunc "The demurrer being considered by the Court, it is ordered that said demurrer be and the same is hereby overruled. The motion to quash being considered by the Court, it is ordered that said motion be and the same is hereby overruled."

JUDGMENT ENTRY NO. 31705
(Appeal 281)

This the 25th day of March, 1971, came Herbert Jenkins, Jr., who prosecutes for the City of Birmingham, and also came defendant in his own proper person and by attorney, Ferris S. Ritchey, and the City files its complaint. The defendant files demurrer and motion to quash. An agreed stipulation of facts if filed and case is continued to April 22, 1971.

This the 13th day of May, 1971, the Court has examined the evidence and the magazine as a whole and finds same to be obscene within the words of the ordinance for that the entire magazine is nothing but a collection of photographs depicting graphically nude men and women with their genitals fully exposed in poses and activities indicating actual sexual intercourse is either intended or has ended between the individuals shown, and its dominant theme appeals to the prurient interest of the average person within the meaning of the U.S. Supreme Court test when taken as a whole, applying contemporary community standards, and is patently offensive to community standards in that the magazine goes beyond the customary limits of candor and explicitness in its representation of sexual matters, and is utterly without any redeeming social value or importance, notwithstanding the fact that no juveniles were involved, there was no thrusting of the material upon unwilling individuals, and there was no pandering in the sale of said magazine. Therefore, the Court upon deliberating the facts and applying the law finds the defendant guilty as charged in the complaint and fixes his punishment at a fine of $300.00 and costs. It is therefore considered by the Court and it is the judgment of the Court that said defendant is guilty as charged in said complaint and that he pay a fine of Three Hundred Dollars ($300.00) and costs of this cause.

The defendant being now in open Court and having presently failed to pay the fine of $300.00 and costs of $10.00 accrued in Recorder's Court of the City of Birmingham or to confess judgment with good and sufficient security for the same, it is therefore considered by the Court, and it is ordered and adjudged by the Court, and it is the sentence of the Law that the defendant, Chester McKinney, perform hard labor for the City of Birmingham for 155 days because of his failure to pay said fine and costs of $10.00 accrued in Recorder's Court, or to confess judgment with good and sufficient security therefor.

It is further considered by the Court, and it is ordered and adjudged by the Court, and it is the sentence of the Law that the defendant, Chester McKinney, perform additional hard labor for the City of Birmingham for 180 days, as additional punishment in this cause.

The costs legally taxable against the defendant in this cause amounting to $32.25 not being presently paid or secured and $10.00 of said amount being State Trial Tax $3.00, Law Library Tax $1.00, Fair Trial Tax $1.00, Peace Officers Retirement $5.00, leaving $22.25 taxable for sentence, it is ordered by the Court that defendant perform additional hard labor for the County for seven days, at the rate of $3.00 per day to pay said costs. It is further ordered by the Court that after the sentence for the City of Birmingham has expired, that the City authorities return the defendant to the County authorities to execute said sentence for costs.

It is further considered by the Court that the State of Alabama have and recover of the said defendant the costs in this behalf expended, including the costs of feeding the defendant while in jail.

This 13th day of May, 1971, Notice of Appeal being given and it appearing to the Court that, upon the trial of this

cause, certain questions of Law were reserved by the defendant for the consideration of the Court of Criminal Appeals of Alabama, it is ordered by the Court that the execution of the sentence in this cause be and the same is hereby suspended until the decision of this cause by said Court of Criminal Appeals of Alabama.

It is further ordered by the Court that the Appeal Bond in this cause be and the same is hereby fixed at $300.00, conditioned as required by Law.

MINUTE ENTRY

This the 4th day of October, 1971, this order was inadvertently omitted from the trial sheet for April 22, 1971, and is entered nunc pro tunc "The demurrer being considered by the Court, it is ordered that said demurrer be and the same is hereby overruled. The motion to quash being considered by the Court, it is ordered that said motion be and the same is hereby overruled."

JUDGMENT ENTRY NO. 31706
(Appeal 282)

This the 25th day of March, 1971, came Herbert Jenkins, Jr., who prosecutes for the City of Birmingham, and also came defendant in his own proper person and by attorney, Ferris S. Ritchey, and the City files its complaint. The defendant files demurrer and motion to quash. An agreed stipulation of facts if filed and case is continued to April 22, 1971.

This the 13th day of May, 1971, the Court has examined the evidence and the magazine as a whole and finds same to be obscene within the words of the ordinance for that the entire magazine is nothing but a collection of photographs depicting graphically nude men and women with their genitals fully exposed in poses and activities indicating actual sexual intercourse is either intended or has ended between the individuals shown, and its dominant theme appeals to the prurient interest of the average person within the meaning of the U.S. Supreme Court test when taken as a whole, applying contemporary community standards, and is patently offensive to community standards in that the magazine goes beyond the customary limits of candor and explicitness in its representation of sexual matters, and is utterly without any redeeming social value or importance, notwithstanding the fact that no juveniles were involved, there was no thrusting of the material upon unwilling individuals, and there was no pandering in the sale of said magazine. Therefore, the Court upon deliberating the facts and applying the law finds the defendant guilty as charged in the complaint and fixes his punishment at a fine of $300.00 and costs. It is therefore considered by the Court and it is the judgment of the Court that said defendant is guilty as charged in said complaint and that he pay a fine of Three Hundred Dollars ($300.00) and costs of this cause.

The defendant being now in open Court and having presently failed to pay the fine of $300.00 and costs of $10.00 accrued in Recorder's Court of the City of Birmingham or to confess judgment with good and sufficient security for the same, it is therefore considered by the Court, and it is ordered and adjudged by the Court, and it is the sentence of the Law that the defendant, Chester McKinney, perform hard labor for the City of Birmingham for 155 days because of his failure to pay said fine and costs of $10.00 accrued in Recorder's Court, or to confess judgment with good and sufficient security therefor.

It is further considered by the Court, and it is ordered and adjudged by the Court, and it is the sentence of the Law that the defendant, Chester McKinney, perform additional hard labor for the City of Birmingham for 180 days, as additional punishment in this cause.

The costs legally taxable against the defendant in this cause amounting to $33.00 not being presently paid or secured and $10.00 of said amount being State Trial Tax $3.00, Law Library Tax $1.00, Fair Trial Tax $1.00, Peace Officers Retirement $5.00, leaving $23.00 taxable for sentence, it is ordered by the Court that defendant perform additional hard labor for the County for seven days, at the rate of $3.00 per day to pay said costs. It is further ordered by the Court that after the sentence for the City of Birmingham has expired, that the City authorities return the defendant to the County authorities to execute said sentence for costs.

It is further considered by the Court that the State of Alabama have and recover of the said defendant the costs in this behalf expended, including the costs of feeding the defendant while in jail.

This 13th day of May, 1971, Notice of Appeal being given and it appearing to the Court that, upon the trial of this

cause, certain questions of Law were reserved by the defendant for the consideration of the Court of Criminal Appeals of Alabama, it is ordered by the Court that the execution of the sentence in this cause be and the same is hereby suspended until the decision of this cause by said Court of Criminal Appeals of Alabama.

It is further ordered by the Court that the Appeal Bond in this cause be and the same is hereby fixed at $300.00, conditioned as required by Law.

MINUTE ENTRY

This the 4th day of October, 1971, this order was inadvertently omitted from the trial sheet for April 22, 1971, and is entered nunc pro tunc "The demurrer being considered by the Court, it is ordered that said demurrer be and the same is hereby overruled. The motion to quash being considered by the Court, it is ordered that said motion be and the same is hereby overruled."

JUDGMENT ENTRY NO. 32077
(Appeal No. 283)

This 21st day of April, 1971, came Herbert Jenkins, Jr., who prosecutes for the City of Birmingham, and also came defendant in his own proper person and by attorney, Ferris S. Ritchey, and the City files complaint. The defendant files demurrer and motion to quash. An agreed stipulation of facts is filed.

This 13th day of May, 1971, said demurrer being duly considered by the Court, it is ordered by the Court that said demurrer be and the same is hereby overruled. The said motion to quash being duly considered by the Court, it is ordered by the Court that said motion to quash be and the same is hereby overruled.

The objection to the evidence is hereby overruled for that the ordinance No. 70-5 of the City of Birmingham, Alabama, provides adequate constitutional procedures which are deemed to safeguard constitutional rights and protect against seizure of protected materials, and therefore there was no unlawful seizure of the film used as a basis of the complaint of the City of Birmingham, Alabama in this case.

The Court, having viewed the movie and the evidence as a whole, finds the same to be obscene within the words of the ordinance for that the movie in its entirety is nothing but a graphic portrayal of nude men and women with their genitals fully exposed in poses and activities indicating actual sexual intercourse is either intended or has ended between the individuals shown, and its dominant theme appeals to the prurient interest of the average person within the meaning of the United States Supreme Court test, when taken as a whole, applying contemporary community standards, and is patently offensive to community standards in that the movie goes beyond the customary limits of candor and explicitness in its representation of sexual matter and is utterly without any

redeeming social value or importance, notwithstanding the fact that no juveniles were involved, there was no thrusting of the material upon unwilling individuals and there was no pandering in the sale of said magazines. Therefore, the Court upon deliberating the facts and applying the law finds the defendant guilty as charged in the complaint and fixes his punishment at a fine of $300.00 and costs. It is therefore considered by the Court and it is the judgment of the Court that said defendant is guilty as charged in said complaint and that he pay a fine of Three Hundred Dollars ($300.00) and costs of this cause.

The defendant being in open Court and having presently failed to pay the fine of $300.00 and costs of $10.00 accrued in Recorder's Court of the City of Birmingham or to confess judgment with good and sufficient security for the same, it is therefore considered by the Court, and it is ordered and adjudged by the Court, and it is the sentence of the Law that the defendant, Chester McKinney, perform hard labor for the City of Birmingham for 155 days because of his failure to pay said fine and costs of $10.00 accrued in Recorder's Court, or to confess judgment with good and sufficient security therefor.

It is further considered by the Court, and it is ordered and adjudged by the Court, and it is the sentence of the Law that the defendant, Chester McKinney, perform additional hard labor for the City of Birmingham for 180 days, as additional punishment in this cause.

The costs legally taxable against the defendant in this cause amounting to $34.70 not being paid or secured and $10.00 of said amount being State Trial Tax $3.00, Law Library Tax $1.00, Fair Trial Tax $1.00, Peace Officers Retirement $5.00, leaving $24.70 taxable for sentence, it is ordered by the Court that defendant perform additional hard labor for the County for eight days, at the rate of $3.00 per day to pay said costs. It is further ordered by the Court that

after the sentence for the City of Birmingham has expired, that the City authorities return the defendant to the County authorities to execute said sentence for costs.

It is further considered by the Court that the State of Alabama have and recover of the said defendant the costs in this behalf expended, including the costs of feeding the defendant while in jail.

This 13th day of May, 1971, Notice of Appeal being given and it appearing to the Court that, upon the trial of this cause, certain questions of Law were reserved by the defendant for the consideration of the Court of Criminal Appeals of Alabama, it is ordered by the Court that the execution of the sentence in this cause be and the same is hereby suspended until the decision of this cause by said Court of Criminal Appeals of Alabama.

It is further ordered by the Court that the Appeal Bond in this cause be and the same is hereby fixed at $300.00 conditioned as required by Law.

JUDGMENT ENTRY NO. 32151
(Appeal No. 284)

This 21st day of April, 1971, came Herbert Jenkins, Jr., who prosecutes for the City of Birmingham, and also came defendant in his own proper person and by attorney, Ferris S. Ritchey, and the City files complaint. The defendant files demurrer and motion to quash. An agreed stipulation of facts is filed.

This 13th day of May, 1971, said demurrer being duly considered by the Court, it is ordered by the Court that said demurrer be and the same is hereby overruled. The said motion to quash being duly considered by the Court, it is ordered by the Court that said motion to quash be and the same is hereby overruled.

The objection to the evidence is hereby overruled for that the ordinance No. 70-5 of the City of Birmingham, Alabama, provides adequate constitutional procedures which are deemed to safeguard constitutional rights and protect against seizure of protected materials, and therefore there was no unlawful seizure of the film used as a basis of the complaint of the City of Birmingham, Alabama in this case.

The Court, having viewed the movie and the evidence as a whole, finds the same to be obscene within the words of the ordinance for that the movie in its entirety is nothing but a graphic portrayal of nude men and women with their genitals fully exposed in poses and activities indicating actual sexual intercourse is either intended or has ended between the individuals shown, and its dominant theme appeals to the prurient interest of the average person within the meaning of the United States Supreme Court test, when taken as a whole, applying contemporary community standards, and is patently offensive to community standards in that the movie goes beyond the customary limits of candor and explicitness in its representation of sexual matter and is utterly without any

redeeming social value or importance, notwithstanding the fact that no juveniles were involved, there was no thrusting of the material upon unwilling individuals and there was no pandering in the sale of said magazines. Therefore, the Court upon deliberating the facts and applying the law finds the defendant guilty as charged in the complaint and fixes his punishment at a fine of $300.00 and costs. It is therefore considered by the Court and it is the judgment of the Court that said defendant is guilty as charged in said complaint and that he pay a fine of Three Hundred Dollars ($300.00) and costs of this cause.

The defendant being in open Court and having presently failed to pay the fine of $300.00 and costs of $10.00 accrued in Recorder's Court of the City of Birmingham or to confess judgment with good and sufficient security for the same, it is therefore considered by the Court, and it is ordered and adjudged by the Court, and it is the sentence of the Law that the defendant, Chester McKinney, perform hard labor for the City of Birmingham for 155 days because of his failure to pay said fine and costs of $10.00 accrued in Recorder's Court, or to confess judgment with good and sufficient security therefor.

It is further considered by the Court, and it is ordered and adjudged by the Court, and it is the sentence of the Law that the defendant, Chester McKinney, perform additional hard labor for the City of Birmingham for 180 days, as additional punishment in this cause.

The costs legally taxable against the defendant in this cause amounting to $30.50 not being paid or secured and $10.00 of said amount being State Trial Tax $3.00, Law Library Tax $1.00, Fair Trial Tax $1.00, Peace Officers Retirement $5.00, leaving $20.50 taxable for sentence, it is ordered by the Court that defendant perform additional hard labor for the County for eight days, at the rate of $3.00 per day to pay said costs. It is further ordered by the Court that

after the sentence for the City of Birmingham has expired, that the City authorities return the defendant to the County authorities to execute said sentence for costs.

It is further considered by the Court that the State of Alabama have and recover of the said defendant the costs in this behalf expended, including the costs of feeding the defendant while in jail.

This 13th day of May, 1971, Notice of Appeal being given and it appearing to the Court that, upon the trial of this cause, certain questions of Law were reserved by the defendant for the consideration of the Court of Criminal Appeals of Alabama, it is ordered by the Court that the execution of the sentence in this cause be and the same is hereby suspended until the decision of this cause by said Court of Criminal Appeals of Alabama.

It is further ordered by the Court that the Appeal Bond in this cause be and the same is hereby fixed at $300.00 conditioned as required by Law.

APPENDIX B

January 11, 1972

STATE OF ALABAMA
JUDICIAL DEPARTMENT
COURT OF CRIMINAL APPEALS OF ALABAMA

6th Div. Nos. 279, 280, 281, 282, 283 and 284

Chester McKinney
vs.
The City of Birmingham

Appeals from Jefferson Circuit Court

On motion of the appellee, it is ordered that the appeals in these causes be and the same are hereby dismissed.

It is also ordered that the appellant and sureties on the appeal bond, pay the costs of appeal of this Court and of the Circuit Court.

APPENDIX C

STATE OF ALABAMA
JUDICIAL DEPARTMENT
COURT OF CRIMINAL APPEALS OF ALABAMA

6th Div. Nos, 279, 280, 281, 282, 283 and 284

Chester McKinney
vs.
The City of Birmingham

Appeals from Jefferson Circuit Court

It is ordered that the applications for rehearing be and the same are stricken.

Per Curiam.

APPENDIX D

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT
IN THE SUPREME COURT OF ALABAMA
OCTOBER TERM 1971-72

6th Division 928 A, B, C, D, & E

EX PARTE: CHESTER McKINNEY, PETITIONER

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(Re: Chester McKinney v. City of Birmingham)

Comes the petitioner, and the Petition for Writ of Certiorari to the Court of Criminal Appeals being submitted and duly examined and understood by the Court, it is considered and ordered that the Petition for Writ of Certiorari to the Court of Criminal Appeals be, and the same is hereby, denied, and the petition be, and the same is hereby, dismissed at the cost of the petitioner, for which cost let execution issue.

STATE OF ALABAMA
MONTGOMERY COUNTY

I, J. O. Sentell, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true, and correct copy of the judgment of the Supreme Court of Alabama rendered on the 24th day of February, 1972, in the above cause, as the same appears and remains of record and on file in said Court.

WITNESS my hand and the Seal of the Court attached at the Judicial Department Building, in the City of Montgomery, this the 4th day of April, 1972.

Seal.

J.O. Sentell, Clerk
Supreme Court of Alabama.

APPENDIX E

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT
IN THE SUPREME COURT OF ALABAMA
OCTOBER TERM 1971-72

6th Division 928 A, B, C, D, & E

EX PARTE: CHESTER McKINNEY, PETITIONER

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(Re: Chester McKinney v. City of Birmingham)

IT IS ORDERED that the application for rehearing filed in this cause on March 7, 197, be, and the same is hereby, overruled.

STATE OF ALABAMA
MONTGOMERY COUNTY

I, J.O. Sentell, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true, and correct

copy of the Order of the Supreme Court of Alabama overruling the application for rehearing in the above cause done on the 23rd day of March, 1972, as the same appears and remains of record and on file in said Court.

WITNESS my hand and the Seal of the Court attached at the Judicial Department Building, in the City of Montgomery, this the 4th day of April, 1972.

Seal.

/s/
J.O. Sentell, Clerk
Supreme Court of Alabama

APPENDIX F

First, Fifth and Fourteenth Amendments, U.S.C. and City of Baltimore Ordinance 67-2

FIRST AMENDMENT, CONSTITUTION OF THE UNITED STATES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assembly, and to petition the Government for a redress of grievances.

FIFTH AMENDMENT CONSTITUTION OF THE UNITED STATES

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; not shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FOURTEENTH AMENDMENT, CONSTITUTION OF THE UNITED STATES

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor

shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CITY OF BIRMINGHAM ORDINANCE
67-2, Section 3

"It shall be unlawful for any person to knowingly publish, print, exhibit, distribute or have in his possession with intent to distribute, exhibit, sale or offer for sale in the City or the police jurisdiction thereof any obscene matter."

This ordinance defines obscene as follows:

"(A) 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex or excretion which goes substantially beyond customary limits of candor in description or representation of such matters. If it appears from the character of the material or the circumstances of this dissemination that the subject matter is designed for especially susceptible audience, predominant appeal shall be judged with reference to such audience. If the subject matter is distributed to minors under eighteen years of age, predominant appeal shall be judged with reference to an average person of the actual age of the minor to whom such matter is distributed."

APPENDIX G

IN THE ALABAMA COURT OF CRIMINAL APPEALS

SIXTH DIVISION

No. 279, 280, 281, 282, 283, 284

MOTION TO DISMISS THE APPEAL OF APPELLANT OR TO AFFIRM THE JUDGMENT

(Filed Dec. 1, 1971)

Comes now the City of Birmingham, a municipal corporation, Appellee in the above styled causes and moves this Honorable Court to dismiss the appeals of Appellant or to affirm the judgments of the Tenth Judicial Circuit Court and for grounds therefor sets forth the following separately and severally in each of above styled causes:

1. For that the consolidated brief of Appellant heretofore filed on November 23, 1971 was not filed in accordance with Rule 12, Revised Rules of the Supreme Court of Alabama, Title 7, Code of Alabama, 1940 (Recompiled 1958) p. 1164, as amended, in that it was not filed within the time for filing the brief of Appellant as extended by order of the Court after the transcripts of the records were filed in this Court on October 6, 1971, which time expired on November 20, 1971, that date being on a Saturday, the last date for filing of Appellant's brief was November 22, 1971.

2. For that the consolidated brief of Appellant heretobefore filed in this Court on November 23, 1971 does not contain a certificate at the end thereof signed by the Appellant or his attorney that a copy thereof has been

delivered or mailed to one of the attorneys for the Appellee, in accordance with Rule 11, Revised Rules of the Supreme Court of Alabama, Title 7, Code of Alabama, 1940 (Recompiled 1958) p. 1164, as amended.

3. For that the consolidated brief of Appellant heretofore filed on November 23, 1971 in this Court does not comply with Rule 8(9), Revised Rules of the Supreme Court of Alabama, Title 7, Code of Alabama, 1940 (Recompiled 1958) p. 1159, as amended, in that Pages 32 through 36, inclusive, are printed in type smaller than pica type.

4. For that the consolidated brief of Appellant heretofore filed on November 23, 1971 in this Court does not comply with Rule 8(9), Revised Rules of the Supreme Court of Alabama, Title 7, Code of Alabama, 1940 (Recompiled 1958) p. 1159, as amended, in that it exceeds fifty pages, not counting cover, index, and list of authorities other than authorities listed under "Propositions of Law".

WHEREFORE, the Appellee moves this Court to dismiss the appeal in each of these causes or affirm the judgment of the Tenth Judicial Circuit Court in each of these causes.

CITY OF BIRMINGHAM, A
Municipal Corporation,

/s/
Herbert Jenkins, Jr.
Attorney for Appellee
600 City Hall
Birmingham, Alabama 35203
